IN THE HIGH COURT OF JUDICATURE AT BOMBAY
APPELLATE SIDE

SECOND APPEAL NO. 16 OF 1989

Doma Kshetri Ghodke & ors. ... Appellants

V/s

Sidram Bhagwan Ghodke ... Respondent

Shri C.G. Gavnekar for the appellants.
None present for the respondent.

CORAM: P.V. KAKADE, J.
DATED: 30TH SEPT., 2004.

P.C.:

1. Heard learned advocate for the appellants. None appears for the respondent.

2. The dispute between the parties pertains to sharing of well water in land of Gat No. 273. The well is said to be a common well and both parties have installed electric motor on the well. The dispute arose between the parties regarding sharing of water and hence the suit came to be filed for determining the rights in that regard.

3. After hearing both sides regarding the evidence, the learned Civil Judge, Jr. Divn., Pandharpur by order

dated 16.7.1995 came to the conclusion that the suit deserves to be dismissed and passed the order accordingly. The appeal was carried to the District Court, Solapur. The learned Addl. District Judge, Solapur, after hearing both parties allowed the appeal and set aside the order of the Civil Judge, Jr. Divn., Pandharpur and suit came to be decreed in favour of the plaintiff. Hence the second appeal was filed by unsuccessful defendant.

4. In the course of hearing, it is brought to my notice that document Exh.99, 100 and 101 were produced by the plaintiff at the appellate stage for which purpose application Exh.9 in the said civil appeal No. 424 of 1985 was made seeking permission of the Court. The learned District Judge called for the say of the other side. The advocate for the defendant vehemently protested such move on behalf of the plaintiff on the ground that the documents which were sought to be produced at the appellate stage were available with the plaintiff even at the trial stage and there was no sufficient reason for production of evidence at appellate stage as it was against the requirements of Order 41 Rule 27 of the C.P.C.

Curiously enough, on perusal of the entire record, no order appears to have been passed by the learned District Judge on this application. However, in the body of this judgment, it appears that he has relied upon the said documents and decided the dispute against the present appellant on the basis of those documents holding that no prejudice was caused to the defendant because of additional evidence brought on record at that stage.

On perusal of the entire record vis-a-vis the judgment of both the Courts below, it is quite apparent that the additional documents sought to be inducted at the appellate stage were crucial for the purpose of determining the real issues between the parties. Now the fact remains that those were relied upon by the lower appellate Court but no order in that regard was passed below application Exh.9 by the said appellate Court and, therefore, it is obvious that defendant was deprived of opportunity to either cross-examine the plaintiff and his witnesses on the basis of these documents, or to lead any other evidence in rebuttal thereon. In my considered view, this lacuna is sufficient to prompt this Court to remand the matter to the lower appellate Court to determine the evidentiary

value of the said documents and to record order in that regard in clear terms which has not been done either due to oversight or for any other reason. Hence the following order:-

O R D E R

The appeal is allowed.

The order passed by the Addl. District Judge, Solapur dated 12.4.1988 is hereby set aside.

The matter is remanded to the lower appellate Court with direction that he shall issue notice to both parties and consider the questions of relevance and admissibility of evidence pertaining to Exhs. 99, 100 & 101 brought on record and relied upon by him while adjudicating the appeal and pass reasoned order below application Exh.9. In doing so, if found necessary, evidence may also be recorded for the limited purpose in view of the observations made in the body of this order.

The matter be decided by the lower appellate Court within six months from the date of receipt of this order after giving notice to both sides.

Office to take necessary steps to transmit R & P back to the lower appellate Court for the said purpose.

.....